

No. 78-1491

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED TELECOMMUNICATIONS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

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The sole question presented in this federal income tax case is whether the decision below correctly upheld the applicable Treasury Regulations and ruled that, for purposes of computing its investment credit, petitioner's qualified investments in self-constructed assets ought not to include construction-related depreciation attributable to construction equipment that had itself been the subject of claimed investment credits.

The pertinent facts may be summarized as follows: Petitioner has a number of operating subsidiaries that are public utilities. During 1964 and 1965, these subsidiaries owned certain motor vehicles and other construction equipment that qualified for the investment tax credit. The subsidiaries in turn used these vehicles and this construction equipment in the

construction of new telephone plant and electric, gas and water plant properties that also qualified for the investment credit. On the consolidated income tax returns petitioner filed with its subsidiaries, it claimed investment credits for both the investments its subsidiaries had made in construction vehicles and equipment and for the investments the subsidiaries had made in self-constructed assets. For purposes of the latter computation, petitioner included amounts attributable to vehicle and equipment depreciation incurred during the period that equipment was used in construction projects in the gross amount of its investments in those self-constructed assets qualifying for the tax credit (Pet. App. A5-A6, A19-A20).

On audit, the Commissioner of Internal Revenue concluded that petitioner's methods of computing investment credits resulted in an impermissible doubling of credits for one investment. Accordingly, he determined, on the authority of Sections 1.46-3(c)(1) and 1.48-1(b)(4) of the Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.), that petitioner could not claim any investment credit with respect to capitalized depreciation attributable to construction equipment that had itself been eligible for the investment credit. Both the Tax Court and the court of appeals upheld the Commissioner's determination (Pet. App. A4-A5, A40). In so holding, the court of appeals observed that the controlling Treasury Regulations (Sections 1.46-3(c)(1) and 1.48-1(b)(4)) were "reasonable and consistent with the statute" (Pet. App. A52).

The decision below correctly held that petitioner could not claim the investment credit on construction-related depreciation on equipment that was itself eligible for the credit. This Court has recently reaffirmed the long-standing postulate that Treasury

Regulations, "if found to 'implement the congressional mandate in some reasonable manner,' must be upheld." *National Muffler Dealers Assn, Inc. v. United States*, No. 77-1172 (Mar. 20, 1979), slip op. 5, quoting *United States v. Correll*, 389 U.S. 299, 307 (1967); see also *Commissioner v. South Texas Co.*, 333 U.S. 496 (1948). This postulate has particular application to Regulations, such as those here, which were promulgated pursuant to express statutory authorization. See Internal Revenue Code of 1954, Section 38(b) (26 U.S.C.). Such "legislative" Regulations must be upheld so long as they are " 'reasonably related to the purposes of the enabling legislation.' " *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *Brewster v. Gage*, 280 U.S. 327, 336 (1930). The "reason for this statutory grant of [regulatory] power in Section 38 * * * [rests on a congressional determination that it was] appropriate to rely upon the administrative flexibility of the Treasury Department for those nice distinctions which must be drawn as to eligibility of various types of property for the investment credit." *Kramertown Co., Inc. v. Commissioner*, 488 F. 2d 728, 730 (5th Cir. 1974).¹

The Regulations are "reasonably related to the purposes of the enabling legislation" and "implement the congressional mandate." They provide that a

¹Petitioner argues (Pet. 10-13) that the Regulations are contrary to the statutory scheme of Section 46(c)(1)(A) which permits it to claim a credit upon its "basis" in constructed property. Even though it must capitalize the construction equipment depreciation in the constructed property's tax basis for other tax purposes (see *Commissioner v. Idaho Power Co.*, 418 U.S. 1 (1974)), Congress gave the Commissioner express authority to implement the investment credit provisions. Petitioner points to nothing in the statute or the legislative history that compels the conclusion that those rules must correspond to the other basis rules of the code, particularly when such correspondence would allow a "double deduction" or credit. *Ilfeld Co. v. Hernandez*, 292 U.S. 62, 68 (1934).

taxpayer may claim one, but only one, investment credit per qualified investment, no matter how that investment may be transmuted into differing assets via a construction project. Under the rules set forth in the Regulations, when a taxpayer uses equipment that might otherwise qualify for an investment credit in the construction of other assets that also can qualify for the credit (see generally Internal Revenue Code of 1954, Section 48(a) (26 U.S.C.)), he can claim a credit for his investment in the construction equipment, but cannot claim an additional credit for the construction equipment depreciation that he capitalized into the cost of the self-constructed asset.

As the courts below noted (Pet. App. A16, A49-A50), the Regulations here are consistent with the congressional "purpose of preventing a double credit" in these circumstances (Pet. App. A50). See, e.g., Internal Revenue Code of 1954, Sections 47,² 48(c)(3)(B) (26 U.S.C.). Indeed, as both the concurring Tax Court judges (Pet. App. A20-A21, n.1, A25-A26, A29-A30) and the court of appeals (Pet. App. A49) observed, the Regulations at issue have been in effect for 15 years (T.D. 6731, 1964-1 Cum. Bull. 11, 25, 36), during which time the investment tax credit has been suspended, restored, repealed, reenacted and substantially broadened by Congress. Further, these

²If not for the Regulations, petitioner might well be required to recapture all investment credits claimed with respect to its construction vehicles and equipment. Only investments in depreciable property can qualify for the investment credit. See Section 48(a)(1). Absent the Regulations (Section 1.48-1(b)(4)), which provide that as to equipment used in the construction of other property "a deduction for depreciation shall be treated as allowable" without regard to the fact that such depreciation must be capitalized, the construction equipment could be considered to have "cease[d] to be section 38 property" during the year of construction and thus have become subject to recapture under Section 47.

Regulations have formed the pattern for subsequent congressional enactments in the area (Internal Revenue Code of 1954, Section 46(d) (26 U.S.C.); H.R. Rep. No. 94-19, 94th Cong., 1st Sess. 38 (1975)). Accordingly, they bear a congressional imprimatur. *National Lead Co. v. United States*, 252 U.S. 140 (1920).

Contrary to petitioner's assertions (Pet. 13-17), the decisions below do not conflict "in principle" with this Court's decision in *Commissioner v. Idaho Power*, 418 U.S. 1 (1974), or with the Ninth Circuit's decision in *Walt Disney Productions v. United States*, 480 F. 2d 66 (1973), cert. denied, 415 U.S. 934 (1974). Neither of these cases holds that an investment credit should be computed upon a basis which includes capitalized depreciation from other investment credit property, neither considered the Regulations here in question, and neither addressed the question whether a taxpayer could claim a twofold investment credit for one investment.³

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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³There is likewise no merit to petitioner's alternative contention (Pet. 21-22) that its investment credits were improperly computed. As petitioner implicitly concedes, its credits were calculated in accordance with the Regulations.